DISCRIMINATION LAW:

EQUALITY IN THE PRIVATE SECTOR

2010-2011

Volume 2

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PART IV: THE SPREAD OF HUMAN RIGHTS ADJUDICATION

12. THE COMPETING FORA ISSUE

Note: In ***Cooper v. Pinkofskys (No. 2)***, 2008 HRTO 390, the applicant was a police officer called as a Crown witness at a criminal trial. He alleged that his cross-examination by defence counsel was discriminatory. The Tribunal dismissed the case, finding that the relationship between defense counsel and a Crown witness does not constitute the provision of a service. The Tribunal held that the Code applied only when there was "some sort of service relationship, as opposed to a mere interaction, between the parties...[D]efence counsel is neither providing services to a larger public of which the applicant is a member nor is there a direct service relationship between defence counsel and a Crown witness. Rather the role of defence counsel at a criminal trial puts that counsel into an adversarial position with all prosecution witnesses called by the Crown in order to secure a conviction of that counsel's client."

Note: ***Forward v. Canada (Citizenship and Immigration)*** (2008), 63 C.H.R.R. D/346 dealt with a complaint by two brothers that the rejection of their application for citizenship was discriminatory. Graham and Evan Forward were born in the U.S. of American parents. Their maternal grandmother, however, was Canadian. Before 1977 fathers who were Canadian citizens were able to pass on citizenship to their children born outside the country; mothers were not. The *Citizenship Act* was changed in 1977 to eliminate this sex discrimination prospectively. Those who were denied citizenship under the old statute were allowed to apply for citizenship, which is to be granted provided the applicant passes a security check and a criminal records check, and swears an oath of citizenship. In such cases, Canadian citizenship takes effect from the date granted. The Forwards' mother, Patricia, applied for Canadian citizenship through her mother under this new provision, but did not apply until 2001. Therefore, when Grahan and Evan were born, in the 1980s, they were born in the U.S. to two parents both of whom then held American citizenship. Nevertheless, they applied for citizenship after their mother had been granted hers, but their application was rejected. They argued that this constituted discrimination in the provision of services. The Canadian Human Rights Tribunal disposed of the complaint as follows:

> [36] In their argument, they specified that what is at issue in this case is not citizenship *per se,* but rather the right of someone claiming citizenship to have his or her application reviewed and administered in a non-discriminatory manner. The service at issue was the reviewing of applications for citizenship.
>
> [37] I do not accept this characterization of the complaint. The evidence and argument in the case was not directed at the conduct of ministerial officials, the exercise of discretion, or at the implementation of departmental policies and practices.
>
> [38] The sole source of the alleged discrimination in this case is the legislative language of the 1977 *Act.* In reviewing the application for citizenship, the officials did nothing more than apply categorical statutory criteria to undisputed facts. Any issue taken with the application review process is really an issue taken with the *Act.*
>
> [39] The respondent takes the position that citizenship cannot properly be considered a service. It relies on authorities holding that citizenship is a privilege — and not a right — that granting states can bestow or withhold on conditions they see fit.
>
> [40] The jurisprudence also indicates that citizenship confers a special, political status on a person that not only incorporates rights and duties but serves a highly symbolic function. The distinction between citizens and non-citizens is recognized in the *Canadian Charter of Rights and Freedoms.* See

Chapter 7: The Grounds Approach

Note: The prohibited grounds of discrimination have developed into a quite detailed system dictating who can't do what *to whom*. In this chapter we look at a sample of efforts to adjudicate the scope of the Code's protection with respect to the grounds upon which discrimination is prohibited:

- whether the category of disability includes discrimination against someone on the grounds of obesity,
- whether a series of unrelated health problems counts as a disability,
- whether family status includes relationships to particular individuals,
- whether failure to provide the same employment benefits to same sex couples as heterosexual couples enjoy is discrimination on the basis of family status,

The point of this section is not to come away with all the latest law on which categories are covered by the Code. Rather, as you read these cases, you should think about both how the scope of the legislation has been defined by the statute and how the courts have gone about interpreting those legislated parameters.

- What function do the categories of prohibited discrimination serve?
- Why do you think the legislature chose the categories it did? Could it have defined the categories differently? If you were a legislative draftsperson, how would you suggest defining them?
- Do the specific categories included tell us anything important about the purpose of discrimination law?

A. Of Pigeonholes and Principles

Note: A significant difference between *Human Rights Codes* and s. 15 of the *Charter* is precisely that the Codes tend to precisely enumerate the prohibited grounds of discrimination whereas the *Charter* is open-ended. In the *Charter* context, Justice L'Heureux-Dubé has been a consistent critic of what she sees as too close a reliance on discerning the grounds of discrimination in s. 15 interpretation. Her critique of the 'grounds approach' is excerpted below. Justice L'Heureux-Dubé offers an approach to discerning when discrimination has occurred that focuses on two factors: the nature of the group affected, and the nature of the interest affected.

- Does her argument apply to the *Human Rights Code* context, that is, should it lead us to be critical of the way in which the *Codes* have been drafted?
- Does her analysis of the nature of the group affected by discrimination help us work out a rationale for the grounds included in the *Codes* and their limits?

Does her analysis of the nature of the interest affected by discrimination help us provide a rationale for the spheres of activity in which discrimination is prohibited by the *Codes*?

Commission, was such as to indicate that obesity increases the chance of becoming ill due to increased risk of heart attacks, high blood pressure, hypertension and the like. The evidence did not tend to illustrate that obesity in and of itself is an illness.

CONCLUSION

[18] 1. The Board rejects the Commission's argument that obesity is the illness rather than the disability caused by illness.

2 The Board declines to hear further evidence.

3. The Board finds as a fact that in this case it has not been established on a balance of probabilities that the complainant's disability is caused by bodily injury, birth defect or illness.

...

In dismissing an appeal from the above decision, the Saskatchewan Court of Appeal (***Saskatchewan Human Rights Comm'n & Davison v. St. Paul Lutheran Home of Melville*** (1993), 19 C.H.R.R. D/437) commented as follows:

Tallis, Cameron and Sherstobitoff JJ.A.

...

Counsel pointed out that the provisions of the *Code* fall to be construed to the end of achieving its objects.... The objects of the *Code*, he went on to point out, include furthering the idea of the inherent dignity of all members of the human family, while its purpose is to rout out discrimination by prohibiting acts, the effect of which is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the human family.

With this we agree. And we think it offensive for an employer to treat one person less favourably than another, when considering them for employment, on the ground that one is overweight or homely or possessed of some such personal attribute having nothing to do with that person's ability to perform the work. Such treatment strikes at the dignity of the person. It constitutes an insensitive and often cruel blow to one's sense of self-worth and esteem. But, as counsel for the Commission acknowledged, not all such acts are prohibited by the *Code*. In other words the expression of the objects of the *Code* occasionally outruns the effect of its enacting parts.

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Note: The definition of disability, while not extended to obesity in the above cases, has come to include a wide variety of illnesses and conditions. However, limits have been imposed. In ***Nahal v. Globe Foundry Ltd.*** (1993), 21 C.H.R.R. D/136, a decision of the British Columbia Council of Human Rights, the adjudicator said, commencing at § 55:

> Not every absence from work for a medical reason constitutes a physical disability within the meaning of the *Act*. Among the factors commonly taken into account in determining whether a given illness or medical condition amounts to a disability are the following. The condition must entail a certain measure of severity, permanence and persistence .... In my view, the series of unrelated episodes of temporary but disabling injuries in this case does not constitute a disability within the meaning of the *Act*. . .
>
> The complainant has provided no evidence of any linkage or continuity between or among any of the injuries. Nor is there any evidence of a cumulative effect or an enduring residue from any of the thirteen separate and unconnected injuries under consideration.

> The complainant has not established that these disparate, unrelated and temporary episodes of injury constitute a physical disability within the meaning of the *Act*. He has therefore failed to establish a *prima facie* case.

This line of reasoning was used in ***Newfoundland (Human Rights Commission) v. Health Care Corp of St. John's (Evans)*** (2003), 46 C.H.R.R. D/63, 2003 NLCA 13 to deny a claim based on disability in the case of a woman passed over for promotion because of excessive absenteeism due to various unrelated ailments. The Court of Appeal in *Evans* noted Justice L'Heureux-Dubé's comment in ***Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits) v. Boisbriand (City)***, [2000] 1 S.C.R. 665, (usually referred to as *Mercier* after the lead Complainant), at § 82:

> Although I believe that health may constitute a "handicap" and thus be a prohibited ground of discrimination under s. 10 of the *Charter*, the same cannot be said of personal characteristics or "normal" ailments. There is not normally a negative bias against these kinds of characteristics or ailments, and they will generally not constitute a "handicap" for the purposes of s. 10. As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (*a* cold for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of "handicap", although they may be discriminatory for other reasons.

In ***Newfoundland and Labrador (Min. or Justice) v. Critch*** (2007), 59 C.H.R.R. D/517, The Newfoundland and Labrador Court of Appeal denied a claim of discrimination based on disability because the complainant did not have a medical condition that was "ongoing and persistent". The complainant was a correctional officer who had suffered an injury to her back at work in 1991, necessitating time off; the back problem was exacerbated by incidents in 1994 and 1997, also requiring the complainant to take sick leave. In February and March 2000 the complainant again took sick leave because of her back. Her supervisor asked her to provide detailed medical information about the nature of the back problem, but the complainant refused, claiming that the request amounted to discrimination because of her disability. Meanwhile, after approximately 6 weeks off work due to this most recent 'flare up' of her back problem, the complainant returned to work and was able to carry out her duties.

In dismissing the complaint, the Court of Appeal adopted the *Evans* definition of disability as involving ""infirmity, malformation or disfigurement of the body suffered by a person as a result of injury, illness or birth defect" that has a degree of severity and permanence." The Court of Appeal agreed with the Trial Division's assessment that because the complainant had been able to return to work and carry out her job duties, "she had no underlying medical condition concerning her back which was ongoing or persistent. In addition, her back problem did not interfere with her employment duties and did not limit her ability to work in any way. As a result, I find that the complainant's back problem was not a "physical disability" as defined in s. 2(1) of the *Code*."

******

Mr. A, but rather solely because of his marital and familial affiliations. Thus the appellants' automatic attribution of the wife and daughter's behaviour to Mr. A reflects stereotypical assumptions about Mr. A that have nothing to do with his individual merit or capabilities. This is precisely the kind of conduct which the Code aims to prevent.

...

The Court concluded that Mr. A was discriminated against on the basis of his marital and/or family status.

*****

C. *Charter* Influences

Note: In *Mossop* (*supra*, p. 433) the plaintiff declined to make a *Charter* argument about the exclusion of sexual orientation from the *Canadian Human Rights Act*. By contrast, the Alberta anti-discrimination legislation, *The Individual's Rights Protection Act*, was challenged in ***Vriend v. Alberta***, [1998] 1 S.C.R. 493. The Court held that "The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction on the basis of sexual orientation. The "silence" of the *IRPA* with respect to discrimination on the ground of sexual orientation is not "neutral". Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them."

After deciding that the s. 15 violation could not be saved under s. 1, Iacobucci J. turned to the appropriate remedy and concluded that "reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation."

The implications for human rights code interpretation in general were considered as follows:

...

105 The respondents take the position that if the appellants are successful, the result will be that human rights legislation will always have to "mirror" the *Charter* by including all of the enumerated and analogous grounds of the *Charter*. This would have the undesirable result of unduly constraining legislative choice and allowing the *Charter* to indirectly regulate private conduct, which should be left to the legislatures.

106 It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the *Charter* in all cases. By virtue of s. 52 of the *Constitution Act, 1982,* the *Charter* is part of the "supreme law of Canada", and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous

grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.

Note: In August 12, 2003 the Ontario Human Rights Commission began referring cases to the Tribunal concerning minors who are afflicted with Pervasive Developmental Disorders, which includes Autism Spectrum Disorder, and Asperger's Disorder. (By December, 2005 the number of cases had reached 245.) Each Complainant alleges that he or she had been discriminated against by the Respondent, Ontario with respect to services because of disability, which is a contravention of sections 1 and 9 of the *Code*. Specifically, the Commission and the Complainants alleged in their pleadings that: the age limit (5 and under) for eligibility in the Intensive Early Intervention Programme ("IEIP") is discriminatory; the failure to provide Applied Behaviour Analysis/Intensive Behavioural Intervention ("ABA/IBI") services with respect to "educational services" is discriminatory on the basis of disability; [and] the waitlist for IEIP, the funding and services—through direct funding and direct service options—offered by the IEIP are discriminatory on the basis of disability. (Around the same time, litigation was underway to challenge the eligibility criteria for the IEIP as contrary to s. 15 of the *Charter*. This challenge was unsuccessful. See *Wynberg v. The Queen in Right of Ontario*, 2006 CanLII 22918 (ON C.A.), leave to appeal to the Supreme Court of Canada denied.

In ***Arzem v. Ontario*** *(Ministry of Community and Social Services) (No.1)* (2005), 52 C.H.H.R. D/170; 2005 HRTO 11, the Tribunal dealt with a motion from the Respondent challenging the Tribunal's jurisdiction to hear the complaints under the Code. Ontario argued that the complaints really display discrimination on the basis of age, not on the basis of disability insofar as the gravamen of the complaints involved the denial of IBI services to autistic children over the age of 5. The government argued that because the Code defines 'age' for its purposes as being over the age of 18, discrimination against those under 18 is not covered by the Code, and the Tribunal lacks jurisdiction to hear such a complaint. The Tribunal summarized the government's argument as follows:

> [17] Ontario asserts that the government's decision to allocate IBI services or to withhold such services is determined on the criterion of age: the choice is to allocate services to children who are less than 6 years, and to withhold such service from children who are more than 6 years. Thus, the case is about the allocation of services based on age.
>
> ...
>
> [19] Ontario argues that the Commission and the Complainants...seek to gain access to IBI services for all autistic children regardless of age. ...
>
> [20] Ontario submits that on the face of the Commission's and the Complainants' pleadings, including the remedy sought, there are clear indications that the allegation of discrimination is based on age. Specifically, part of the Commission's relief is that Ontario cease and desist from the practice of automatically cutting off funding for ABA/IBI treatment for autistic children who have reached or past the age of six. Further, Ontario asserts that of the 90 Complaints, nine are less than six years of age; only one would be less than six years after December 2005. ...In addition, Ontario says, the fact that some Complainants have launched a constitutional challenge supports its proposition that the ground engaged here is age. Thus, Ontario concludes, the Complaints are based on nothing but age discrimination in respect of an age that is less than 18 years: the Complaints are not discrimination because of disability, although couched in such diction.
>
> [21] Ontario argues that the *Code* defines the jurisdiction of the Commission and the Tribunal. It lists the prohibited grounds of discrimination, which essentially define

the jurisdiction of the Tribunal. The prohibited grounds of discrimination with respect to services include "age" and "disability". The *Code* defines age to mean an age of 18 years or more, except in the employment provision in subsection 5(1); there, age means an age of 18 or more and less than 65 years.

The Tribunal summarized the Commission's argument in reply as follows:

[39] The Commission submits that the Complainants face discrimination on the basis of disability as well as age. It submits that in *Dudnik v. York Condominium Corp. No. 216 (No. 2)* (1990), 12 C.H.R.R. D/325 (Ont. Bd. Inq.), the Tribunal had found that the exclusion of children from a condominium building constitutes discrimination on the basis of age and family status. To the extent that the age definition in the *Code* precludes protection to disabled persons who are less than 18 years, there is a conflict with section 15 of the *Charter* and is therefore, of no force and effect with respect to the Complainants. Relying on that decision, the Commission says the Tribunal may proceed with these Complaints on the ground of disability separate from the ground of age.

...

[42] The Commission submits that if the Complainants were merely six years and had no autism, most likely, they would not be before the Tribunal. Nothing is wrong with being six, 16 or 18 years of age, argues counsel. However, if the Tribunal finds that discrimination is based on age, the definition of age in the *Code* must be subjected to constitutional scrutiny. The Tribunal has jurisdiction to consider and decide whether the *Code's* definition of age is inconsistent with the *Charter*. The Commission relies on *Nova Scotia (Workers' Compensation Board) v. Martin: Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 (S.C.C.).

[43] The Commission argues that by stating that the Complaints are based on age discrimination, Ontario has classified these Complaints erroneously. As a result, Ontario has selected the comparator for the Complainants to be autistic children who are less than six years of age. That is incorrect. The Commission avers that the proper comparators are "non-autistic children, adults with mental disabilities and persons with physical disabilities." Relying on *Law,* the Commission argues that in choosing the proper comparator, one must examine the subject matter of the legislation, its effect, and the contextual factors—factors that determine whether the legislation has the effect of demeaning a complainant's dignity—which must be examined and interpreted from the complainant's perspective.

[44] The Commission asserts that it is only a short period that separates those children who are now less than six years, and are not complainants, from these Complainants. The children in both categories are in the same situation: those children who are less than six years and receive treatment will have the service cut off when they are over six years and will be in the same situation as those over six. So, really, there is no comparison between them.

[45] The Commission submits that treatment for people with physical disabilities is not allocated or discontinued based on age. However, treatment for autism alone is subject to cut-off based on age. Moreover, the Commission argues, the termination of treatment is arbitrary: there is no accommodation based on individual assessment, and there is no flexibility in the policy regarding the age cut-off. There is no regard for medical evidence whether the Complainants would benefit from further treatment. That difference in treatment constitutes discrimination based on disability....

The Tribunal rejected the want of jurisdiction argument on the grounds that the Code requires that the Tribunal hold a hearing in respect of all complaints forwarded to it, and the government had neither made out abuse of process nor that the complaints displayed no cause of action. With respect to the question of discrimination based on age, the Tribunal said,

> [80] On the face of the record, the factual underpinnings about the ground of age and disability are linked inextricably. The extent of that linkage is so critical that the Tribunal believes that if they were to be severed, the Tribunal would not be able to conduct a meaningful hearing. The scope of the Tribunal's hearing would circumscribe significantly and unnecessarily, and thus, only allow the Tribunal to render a decision, which likely would be useless....
>
> [82] The Complainants have served notice of their intention to launch a constitutional challenge of subsection 10(1) of the *Code*. Accordingly, the Tribunal will proceed to hear this motion....
>
> [86] The Tribunal has concluded that on the face of the record, it appears that these Complaints involved the grounds of age and disability. Because the factual underpinnings are so critically inextricably linked, the Tribunal has determined that it would meet the ends of justice to hold a hearing under subsection 39(1) to determine whether these grounds or any other had been infringed by Ontario. However, because on the face of the record, the protection of the right to equal treatment with respect to service, without discrimination because of age is precluded from children who are less than 18 years, the Tribunal will hear the Constitutional question on whether subsection 10(1) of the *Code* violates subsection 15(1) of the *Charter*.

The question of the constitutionality of subsection 10(1) was taken up in ***Arzem v. Ontario (No.6)***, (2006), CHRR Doc. 06-385; 2006 HRTO 17. The Tribunal held that the restriction of the Code's protection to those over 18 violates s. 15 and cannot be justified under s. 1. She therefore ordered the definition of age in the Code struck and of no force and effect for purposes of these complaints. She also gave the complainants leave to amend their pleadings to include a complaint of discrimination on the basis of age. In response to the government's argument that it is not necessary that Human Rights Codes perfectly mirror the *Charter*, the Tribunal remarked,

> ...It cites *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229 [13 C.H.R.R. D/171], to support that submission. Further, it argues, although section 52 of the *Constitution Act, 1982* requires that human rights legislation, like all legislation in Canada, conforms to its requirement, section 32 of the *Charter* is clear, it applies to government action or omission only. By contrast, says Ontario, the *Code* applies to private and public conduct. The Constitution has left the task of "defining human rights protection offered in the private sector to the Legislative branch".
>
> Without engaging in a full analysis of the "notion of mirroring", the apparent difficulty with Ontario's submission is that it ignores that the ground under question, age under the *Code*, is also an enumerated ground under the *Charter.* The notion of mirroring therefore is not applicable in this case.
>
> Having made that conclusion, one must be mindful of the notion of mirroring and Cory J.'s comments so that it is not used as no more than a mere simplistic approach or a mere riot of thoughts. By inference, Cory J. was cautioning an applicant, as well as a respondent, not to rely on such an argument, without more. ...

[The Tribunal quoted the passage from *Vriend* at para. 106 excerpted above and then continued:]

> The Court's approach in *Vriend* no doubt is different from its approach in *McKinney.* It can be inferred from the quote above, that more than likely, a deliberate omission of a *Charter* enumerated ground from a human rights code will attract *Charter* scrutiny and be found to be discriminatory. It is challenging to envision a case that is not discriminatory where there is a deliberate omission of a ground from human rights codes that is an enumerated in the *Charter*.
>
> Second, there is the troubling inference from Ontario's argument that since the Legislature has deliberately omitted the protection of children from discrimination on the ground of age from the *Code*, the Legislature's action is or should be immune from *Charter* scrutiny. It is immune because it was acting within its scope to define the human rights protection, which should be offered in the private sector. ...
>
> The purpose and effect of the definition of age in the *Code,* brings the *Code* within the realm of under-inclusive legislation. *As* the Court established in *Vriend*, under-inclusive legislation is an act of the Legislature. It is trite that when government acts, it must not do so in a discriminatory way. In this case, there is no doubt that the Legislature deliberately precluded every person under age 18 less a day from the protection of discrimination because of age by the restrictive definition of age. Surely, the *Charter* leaves the task of regulating and advancing the cause of human rights in the private sector to the Legislature: *McKinney*, at p. 318. Yet, in *Vriend*—a case, which challenged the *Individual's Right Protection Amendment Act, 1996*, S. A., 1996, c.25—where the Court considered *McKinney* at length, the majority refused to give any deference to the Legislature's choice. The words of Cory J., writing for the majority in *Vriend*, at paras. 61, 62, and 65 are apt:
>
> > The IRPA is being challenged as unconstitutional because of its failure to protect Charter rights, that is to say its under-inclusiveness. The mere fact that the challenged aspect of the Act is its under-inclusiveness should not necessarily render the Charter inapplicable. If an omission were not subject to the Charter, under-inclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from Charter challenge. If this position [were] accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair. Therefore, where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the Charter.
> >
> > It might also be possible to say in this case that the deliberate decision to omit sexual orientation from the provisions of the IRPA is an "act" of the Legislature to which the Charter should apply. This argument is strengthened and given a sense of urgency by the considered and specific positive actions taken by the government to ensure that those discriminated against on the grounds of sexual orientation were excluded from the protective procedures of the Human Rights Commission. However, it is not necessary to rely on this position in order to find that the Charter is applicable.

for cancer which caused her to miss work for significant periods, though her sick leave record was otherwise quite good. Following the reasoning of the Commission, this case could not be characterized as the assessment of an employee with a disability against an able-bodied candidate using standards developed by and on the basis of able-bodied employees. Rather, on the logic of the Commission both candidates had disabilities because both had had illnesses or injuries which have been the basis for a finding of disability in other cases.

[37] In summary, the appellant has not established that the adjudicator erred in failing to find discrimination on the basis of disability or that the Trial Division judge erred on appeal. For the reasons given above, the appeal is dismissed. Health Care is entitled to its taxed costs as against the appellant.

****

i. Treatment 'as though'

Note: The simple problem of misperception has never created a difficulty in finding discrimination. If an employer refuses to hire someone whom he *thinks* is Aboriginal, for example, he will be held to have discriminated even if the complainant is not Aboriginal. The perception issue creates special problems in the disability context because a respondent can be mistaken on more than one level – whether a condition is a disability, whether the complainant has that condition, and whether that condition gives rise to any functional limitation. This section introduces a new twist: is it discrimination to behave in a homophobic manner if the victim is not gay and those harassing him know he's not gay?

Jubran v. Board of Trustees

[2002] B.C.H.R.T.D. No. 10

INTRODUCTION

[1] On June 19, 1996, Azmi Jubran filed a complaint (Exhibit 1) with the B.C. Human Rights Commission, in which he alleged that the Board of School Trustees, School District No. 44 (North Vancouver) [the "School Board"] discriminated against him regarding an accommodation, service or facility customarily available to the public because of his sexual orientation, contrary to Section 8 of the *Human Rights Code,* R.S.B.C. 1996, c. 210 (as amended) [the "*Code*"]. The Deputy Chief Commissioner added himself as a party to the hearing on October 15, 1999, pursuant to s. 36(1) of the *Code.*

BACKGROUND

[2] Mr. Jubran was born in Vancouver in 1980. From September 1993 to June 1998, he attended Handsworth Secondary School ["Handsworth"] in North Vancouver. Handsworth is located within School District No. 44 (North Vancouver). Currently, there are approximately 70 teachers and 1335 students in Grades 8 through 12 at Handsworth. [3] Mr. Jubran, who does not identify himself as homosexual, alleges that, for the five years he attended Handsworth, he was taunted with homophobic epithets and physically assaulted, including being spit upon, kicked and punched by other students, because of his perceived sexual orientation. Mr. Jubran further claims that the School Board knew about other students' behaviour towards him, and that it is responsible for the harm caused to him because it failed to provide him with a safe learning environment.

as one of general law then the application of law to a particular set of facts is afoot, the standard of review is reasonableness and the result is the same for the Tribunal's finding at step (1) (*supra*) was in turn based on an unreasonable conclusion, i.e. that s. 8 captured the conduct of the students in the case at bar. (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.)

13 The Supreme Court of Canada has ordered the Tribunal and me not to let the application of legislation such as s. 8 of the *Human Rights Code* slip the anchor of the words chosen by the legislature. (*U.B.C. v. Berg*, *supra*, at 678). The Tribunal's decision, and the submission placed before me by Jubran's counsel, equate discrimination through harassment by the use of hurtful words of a sexual nature with discrimination "because of the sex or sexual orientation OF THAT PERSON OR CLASS OF PERSONS". (Emphasis added). That those two things may coincide in a given case does not mean that they do coincide in every case. And here, in the case at bar, the bottom facts as found by the Human Rights Tribunal take the case wholly outside the words of the Act.

14 In the result the Human Rights Tribunal's conclusion at step 1 - that the School Board contravened s. 8 of the *Human Rights Code* - was based on an incorrect finding, i.e. that the students' conduct fell within s. 8 of the Code.

15 That being so the decision of the Human Rights Tribunal is fatally flawed and must be, and is, quashed. ...

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Note: In a case comment on *Jubran*, "Grading Human Rights in the Schoolyard: *Jubran v. Board of Trustees*" (2003) 36 U.B.C. Law Rev. 45, William Black argues that it would have been more in keeping with the purpose of human rights codes if homophobic harassment were prohibited regardless of the actual identity of the target or the perceptions of the harasser. He describes the purpose as follows (p. 47):

> The purpose of human rights legislation is not to deal with all types of unfairness. Instead, its purpose is to protect against discrimination related to grounds such as race, sex or sexual orientation. The reason for that focus is that discrimination related to such grounds causes harm going beyond the interests of the individuals directly affected. Discrimination on protected grounds reflects entrenched patterns of prejudice. Those patterns have detrimental consequences for society at large and it is in the public interest to provide a mechanism to eradicate such discrimination. That purpose is reflected in section 3(d) of the *Code* which provides that one purpose of the legislation is "to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*."

While he acknowledges that a "connection does have to be shown between the conduct and a prohibited ground", he argues that the connection need not be based on either Jubran's self-identification as gay or on his tormentors' perception that he is gay. Stewart J., he says, should have considered the possibility that the remarks were "based, at least in part, on the fact that [Jubran] exhibited some of the negative stereotypes about gay men."

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Chapter 8: Recent Trends: Formalism Three and a Half Ways

- ❖ Requirements alleged to fit the essential character of the enterprise
- ❖ The use of a comparator group analysis to ascertain differential treatment
    - Narrow interpretation of 'service'
- ❖ The appeal to dignity to identify discrimination

Note: With the advent of a unified test for the justifiability of a policy or decision, many advocates expected that the application of the duty to accommodate in all kinds of discrimination cases would lead to a general climate in which some form of accommodation could almost always be found. But as the cases testing the idea of undue hardship have developed, arguments have emerged on the respondents' side that take a categorical form, not unlike the original conception of the BFR defence in *Etobicoke*. There are at least three sorts of arguments emerging that seem to have this character.

When the issue is argued as a matter of whether the BFR + duty to accommodate defence has been made out, the argument tends to appear in the form of a claim that the policy in issue is somehow constitutive of the essence of the enterprise. This argument unfolds against the backdrop of the fact that, by definition, discrimination law interferes with the traditional freedoms of employers to decide how to conduct their business. Each situation in which an 'essence of the enterprise' argument succeeds is one in which adjudicators have decided, in effect, that it is inappropriate to require change in the name of human rights. Ask yourself how well this fits with the notion of the imposition of undue hardship as the limit on human rights protection. What is the undue hardship in these cases if the respondent is required to accommodate further?

Sometimes, however, this tendency appears in response to a dispute over whether the applicant must compare herself to some appropriate comparator group to make out discrimination. When the issue is presented this way, it disrupts the conventional approach as to what is involved in establishing a *prima facie* case versus the issues relevant to making out a defence. In Chapter 2, we teased out two versions of the connection between the respondent's actions and a prohibited ground that might be said to establish differential treatment *because of* a prohibited ground. One looks to the respondent's reasons to see if the prohibited ground was part of the reason for the applicant's treatment; the other focuses on the effects of the respondent's policies or conduct. In either case, some likelihood of differential treatment has traditionally been held to make out the applicant's *prima facie* case, whereupon the respondent must show that the requirement imposed is a BFR (which now includes the duty to accommodate). It has usually been assumed that in cases in which the respondent has explicitly used a prohibited ground, the prima facie case is straightforwardly established, and that in cases of adverse effects discrimination, the case is made by establishing that a policy or rule disproportionately affects members of a group identified by reference to a prohibited ground. Either means of showing differential treatment connected to a prohibited ground was sufficient to trigger a shift of burden to the respondent to justify the conduct. As you read the cases below that take up the comparator group issue, ask yourself how the argument about the appropriate comparator group fits with or disrupts this conventional analysis.

There are two questions to consider here: what are the implications for an effects-based account of discrimination, and what are the consequences for the conventional

understanding of the division of labour between complainant and respondent in litigating a complaint and the allocation of the burden of proof. The overarching question that gives rise to this debate is that of what the role of comparison is in adjudicating a discrimination complaint.

Finally, as we have already seen in our earlier discussion of *Tranchemontagne* (Vol 1, Ch. 2, p. 75), a trend has emerged of reading the test for a violation of s. 15 of the *Charter* into human rights jurisprudence. It has tended to be respondents making this argument, which tells us that they think the s. 15 test is more restrictive than the traditional *Code* test. That is, they think that the s. 15 test gives them a hook to make an argument that may not be as readily available under the two step test under the *Code*. Sometimes the influence of s. 15 appears in the form of a comparator group argument – this issue has been an important element in recent s. 15 cases; sometimes s. 15 is argued to be relevant in its imposition of a requirement that there be some violation of human dignity in order to make out a complaint. This argument, too, threatens the conventional distinction between the *prima facie* case and the issue of whether a defence is available.

These different arguments are often treated as though they are distinct. A respondent who is looking for some way, any way, of avoiding liability will sometimes make all three arguments at different stages of the case, or at least two of the three. But if these arguments are not really distinct – if they are different ways of trying to get at the same issue – the confusion about whether the argument is relevant to whether the *prima facie* case has been made or to whether a defence has been established will have consequences for the intelligibility of human rights law.

The first three cases below show the overlap between the comparator group argument and the argument that an enterprise can have an essence that simply cannot be compromised, making no accommodation possible. They are followed by a case (*Moore*) that combines an argument about which group the complainant should be compared to with a novel argument about how the 'service' at issue should be interpreted. In the next two cases the argument is put squarely in terms of the essence of the enterprise. Of these *Nixon* demonstrates the pitfalls of such an argument – if the adjudicator understands the essence of the enterprise differently than the respondent does, the rest of the argument unfolds very differently than the respondent might have hoped. Finally, we will turn to the cases in which the dignity component of the s. 15 jurisprudence is explicitly drawn upon and the entire structure of a s. 15 analysis is more generally imported.

Note: In ***Hydro-Québec.v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec,*** 2008 SCC 43, the Supreme Court again dealt with the termination of a disabled employee for innocent absenteeism. Unlike in *McGill Hospital*, the employee was not totally disabled, but medical evidence suggested that she would continue the pattern of intermittent absenteeism evident in her past work record (960 missed days between January 3, 1994 and July 19, 2001). The arbitrator denied the employee's grievance, and the Superior Court dismissed a motion for judicial review. On appeal, however, the Court of Appeal set aside the arbitrator's decision. The Supreme Court, overturning the Court of Appeal, took the opportunity to clarify the wording used in *Meiorin* to describe the undue hardship standard:

> Two problems are apparent upon reading the decision of the Court of Appeal. The first is that the standard that court applied to determine whether the employer had fulfilled its duty to accommodate was whether [TRANSLATION] "it was impossible to [accommodate the complainant's] characteristics", and the second is that, according to the court, the duty of accommodation must be assessed as of the time of the decision to dismiss.
>
> Standard for Proving Undue Hardship
>
> Despite the large number of decisions concerning the rules developed in *Meiorin*, the concept of undue hardship seems to present difficulties. Certain aspects that have caused interpretation problems in the case at bar therefore need to be reviewed. First of all, it will be helpful to reproduce the explanation of the approach given in *Meiorin* (para. 54):
>
> > An employer may justify the impugned standard by establishing on the balance of probabilities:
> >
> > 1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> >
> > 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> >
> > 3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> The relevance of the approach is not in issue. However, there is a problem of interpretation in the instant case that seems to arise from the use of the word "impossible". But it is clear from the way the approach was explained by McLachlin J. that this word relates to undue hardship (para. 55):
>
> > This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this *can be done without undue hardship to the employer*. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool*, [[1990] 2 S.C.R. 489], at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences *to the point of undue hardship* if it is to be found reasonably necessary. Unless no further accommodation *is possible without imposing undue hardship,* the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands. [Emphasis added.]

What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances. This is clear from the additional comments on undue hardship in *Meiorin* (para. 63):

> For example, dealing with adverse effect discrimination in *Central Alberta Dairy Pool*, *supra*, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also *Renaud*, [[1992] 2 S.C.R. 970], at p. 984, *per* Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in *Chambly*, [[1994] 2 S.C.R. 525], at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

As these passages indicate, in the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship. ...

As L'Heureux-Dubé J. stated [in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27, at para. 36], the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. The burden imposed by the Court of Appeal in this case was misstated. The Court of Appeal stated the following:

> [TRANSLATION] Hydro-Québec did not establish that [the complainant's] assessment revealed that *it was impossible to [accommodate] her characteristics*; in actual fact, certain measures were possible and even recommended by the experts. [Emphasis added; at para. 100.]

The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties — or even authorize staff transfers — to ensure that the employee can do his or her work, it must do so to accommodate the employee. ... [I]n the case at bar, Hydro Québec tried for a number of years to adjust the complainant's working conditions: modification of her workstation, part-time work, assignment to a new position, etc. However, in a case involving chronic absenteeism, if the employer shows that, despite

measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. I adopt the words of Thibault J.A. in the judgment quoted by the Court of Appeal, *Québec (Procureur général) v. Syndicat des professionnelles et professionnels du gouvernement du Québec (SPGQ)*, [2005] R.J.Q. 944, 2005 QCCA 311: [TRANSLATION] "[in such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship" (para. 76).

> The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

Note: Following *McGill Hospital*, the Court also held that "Undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence, not from the expiry of the three-year period. ... A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. Where, as here, the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship." (para. 20-21)

...

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Note: The above cases might be said to blend an argument based on an understanding of the essence of the enterprise with an analysis of the role of comparison, in particular, what is the appropriate comparator group to use to assess the complainant's claim. In the next case, the decision hinges as much on the Court's construction of the 'service' in issue as on the comparator group used, but again, the two arguments go hand in hand. What do you think is the connection between the service argument and the comparator group argument? Is there a similarity to the essence/comparator group cases?

claimed constituted differential failure to ensure the availability of appropriate special education programs and services when these or comparative services were not shown to have been provided to any other students within the special education categories for special needs funding and programming. There is no basis here upon which this Court could infer that other special needs students were provided with special education programs so unique to their needs that academic literature was scrutinized for options to promote individual potential and then those optimal, new programs were implemented regardless of whether they had been integrated into teacher education or the general public education plan.

[148] Similarly, there is a paucity of evidence to support systemic discrimination on a comparative analysis to be able to conclude that SLD students were disproportionately impacted.

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Note: In *Moore*, the court rejects the argument of the Tribunal that it was not necessary or helpful to identify a comparator group. This debate also arose in ***ADGA Group Consultants Inc. v. Lane,*** 2008 CanLII 39605 (On S.C.D.C). Lane claimed that he was fired days after starting a job as a software program tester with AGDA when his employer discovered that he suffered from Bipolar 1 Disorder. Lane had not disclosed his condition during the application process because he was afraid it would be held against him. Once on the job, though, he told his supervisor and asked her to keep an eye out for particular behavioural symptoms indicative of a pre-manic state and if observed to call his wife. The nature of his disorder was such that early intervention could prevent the situation deteriorating to full-blown mania. The supervisor's reaction was not hostile, but not terribly understanding, causing Lane to worry that his job was at risk. This kind of stress was one of the triggers for a manic episode, and indeed, over the next working day, Lane began to exhibit symptoms of a pre-manic state. In the meantime, the supervisor alerted her own boss to Lane's condition – both his disclosure of his condition and the presence of symptoms – and a decision was taken to dismiss him immediately. ADGA took the view that Lane was unable to perform the essential requirements of the job, which required meeting very tight timelines. At the hearing, AGDA also claimed that Lane had been dismissed because he had lied on his job application.

Before the Tribunal and again on appeal to the Divisional Court, the Human Rights Commission argued that the comparator group analysis did not apply to this situation. The Commission argued that a determination of whether there has been discrimination on the basis of disability requires that three criteria be met:

1. the existence of a distinction;
2. the distinction is based on disability or perceived disability; and
3. the distinction has the effect of nullifying the right to full and equal exercise of human rights and freedoms.

Once these conditions are met, the Commission argued, the burden shifts to the respondent to show that the complainant could not be accommodated, and none of the conditions requires the identification of a comparator group. The Divisional Court summarized the argument as follows:

> [88] The Commission submits that the comparator group analysis is inappropriate because a person with a disability who seeks accommodation of his or her needs does not seek to be treated the same way that others are treated. Avoiding discrimination on the basis of disability requires distinctions to be made taking into account the actual personal characteristics of people with disabilities. It is the failure to accommodate

> needs to the point of undue hardship which results in discrimination against persons with disabilities. ...
>
> [89] The accommodation process must be individualized. The extent of the duty to accommodate varies with the characteristics of each enterprise and the specific needs of each employee.
>
> ...
>
> [91] Disability cases where accommodation is sought, such as in *Grismer*, *Eldridge*, and the case at bar, can be distinguished from cases where a person with a disability seeks identical treatment in the form of equal access to a benefits scheme. It is the latter cases that may be conducive to a comparator group analysis because the person with a disability is seeking equal access to the same benefit provided to persons with different disabilities.

By contrast, AGDA argued that a finding of discrimination required "evidence that the complainant wqas treated differently than other employees in a particular comparator group, because of his disability." Its argument was further summarized as follows:

> [84] ADGA submits that the proper comparator group was those employees (those who suffered from a disability and those who did not) who are probationary employees. Using a broader comparator group, such as the organization as a whole, is inappropriate as it does not permit comparison of similarly situated employees, and fails to take into account the purpose of the probationary period assessing the suitability and performance of the employees. There was no evidence before the Tribunal that the Complainant was treated differently from any other probationary employee, and no comparison of other employees who for whatever reason showed tangible evidence that they would be unable to perform the essential duties of the job. However, there was evidence that employees on probation are released for an inability to perform the essential duties of their positions.

In response, the Divisional Court held:

> [94] I agree with the submissions of the Respondent Commission. In cases of disability in the employee termination context, it is not necessary or appropriate to have to establish a comparator group.
>
> [95] Disability cases bring with them particular and individualized situations. Once it is established that the termination of the employee was because of, or in part because of, the disability, the claimant has established a *prima facie* case of discrimination. The onus then shifts to the employer to establish that it met its duty of procedural and substantive fairness to the point of undue hardship.
>
> ...
>
> [97] The Tribunal made an extensive and careful analysis of the evidence and came to the conclusion that Lane was "dismissed because of his disability and perceptions as to the impact of that disability on workplace performance."
>
> [98] ADGA's position is that Lane misrepresented his ability to do the job for which he was hired. The Tribunal held that he did not do so. The Tribunal found that out of fear of a stereotypical reaction to someone with a mental illness leading to a decision not to hire, Lane did not reveal his illness to his prospective employer and misrepresented the number of his sick days in the preceding year.
>
> ...
>
> [100] In these circumstances, the Tribunal held that ADGA could not rely on "Lane's lying" as "an independent basis for dismissal and thereby avoid having to

account for its treatment of him as someone exhibiting the symptoms of bipolar disorder in the workplace."

[101] In this the Tribunal was correct. Lane was under no obligation to disclose his disability – nor indeed his record of sick days. The Tribunal held as a fact that he did not misrepresent his ability to perform the tasks required of him. The Tribunal held as a fact that he was terminated because of his disability.

[102] In summary, the Tribunal correctly applied the law to the facts which it found. The conclusions on the facts were reasonable in the determination that the Commission had made out a *prima facie* case of discrimination.

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Bastide v. Canada Post Corp.

[2005] F.C.J. No. 1724 (aff'd *Bastide v. Canada Post Corp.*, 2006 FCA 318 (CanLII))

de MONTIGNY J.:-- ...

BACKGROUND

3 It seems that since 1976, all individuals who have wanted to obtain regular employment as a postal clerk (salary level PO4) in a mechanized plant have had to pass a dexterity test. This test is intended to establish the basic skills to see if the employees are able to proceed with the training program intended to teach them to code postal codes in the mechanized plants. As a matter of fact, the coding work requires dexterity and the capacity to rapidly coordinate a visual observation and the action of the keys on a coding keyboard.

...

5 The dexterity test administered in 1995, which is the subject of this application for judicial review was thus used to evaluate the basic skills of the temporary employees (formerly called "casual help") at the downtown Letter Processing Plant (LPP). Passing the test gave access to a regular part-time or full-time position as a PO4 clerk. It also gave access to the coding training and, if this training was successfully completed, they could obtain a position at the coding desk or the videocoding system.

6 There was evidence that the downtown LPP receives and processes approximately three million pieces of mail daily. It is highly mechanized and uses cutting-edge technology. Many pieces of equipment require coding on a computer keyboard.

7 PO4 postal clerks work in the mechanized area and in the manual area, at Mail Preparation or at the Receipt Verification Unit. In the mechanized area, PO4 postal clerks are called CSS clerks (coder, sweeper, sorter). They perform such tasks as feeding the machines, working at a computer keyboard to code mail according to the postal code symbols and emptying machines. In the manual area, PO4 clerks do the work that could not be performed mechanically. As in the mechanized area, the employees do primary sorting and final sorting of mail but do it manually. Finally, in the Receipt Verification Unit, the PO4 clerks check the mailings of certain major clients to ensure that everything is consistent with the contract entered into by the Corporation and its clients and that the fees have been paid.

8 Even if not all PO4 clerks are called upon to perform coding operations, it is evident that the trend towards mechanization is such that a substantial portion of the staff is called on

providing many of the same services as Rape Relief, and which accepts transgendered women as both clients and volunteers.

[206] In addition, I heard evidence from Lynn Jones that in her career as a placement officer in mental health facilities she placed pre-operative male to female transsexuals in women's care facilities without incident. Finally, and most persuasively, I heard Ms. Nixon's evidence, supported by that of Gail Edinger and Eleanor Friedman, that Ms. Nixon is able to deliver the services offered by Rape Relief without disruption or harm to any woman who is in a peer support group of which she is a member or facilitator. In her evidence Ms. Nixon said:

> In my experience that never occurred. It just didn't happen. Women, because of my nature, my compassion, my empathy, and my experiences, which were similar to their experience of abuse, I'm able to connect that way with women very well on the crisis lines and in person.

[207] In light of all of this evidence, I conclude that Rape Relief has not established that its standard was reasonably necessary to its goal or purpose. It did not meet its obligation to accommodate Ms. Nixon to the point of undue hardship.

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Note: In *Law v. Canada*, [1999] 1 S.C.R. 497 the Supreme Court of Canada held that to establish a violation of s. 15 of the *Charter*, a claimant had not only to show differential treatment connected to a prohibited ground, but also that the differential treatment is "substantively discriminatory". This has sparked a wave of litigation about the applicability of the approach in *Law* in the *Human Rights Code* context. Adjudicators, both Tribunals and Courts, have taken a variety of approaches to the issue of the relationship between the *Charter* test and the *Code* test.

In ***Gwinner v. Alberta (Human Resources and Employment)***, 2002 ABQB 685 (Greckol J.) aff'd 2004 ABCA 210, the claimants, who are divorced, brought complaints under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 claiming that the Widows Pension Act, R.S.A. 2000, c. W-7 discriminates against them on the basis of their marital status because the Act makes pensions available to persons who were married at the date of their spouse's death but does not make pensions available to persons who were divorced or separated at the date of their former spouse's death. The claim was brought under the provision protecting against discrimination in the provision of services customarily available to the public.

In defending against the claim, Alberta argued that the *Law* test should be applied. Greckol J. based part of her analysis of the issue on the structure of the *HRCMA*, in particular the role of s. 11.1:

> 11.1 A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

...

> [91] Counsel for the Crown has raised a serious and substantive argument that restricting this government service to the widowed is not discriminatory. The Crown relies upon the Supreme Court of Canada's decision in *Law*, a *Charter* equality rights case. The *Law* decision, while reaffirming and clarifying the analytic framework to be used in applying s. 15(1) of the *Charter*, also articulated an approach to the third step of the analysis rooted in the fundamental purpose of s. 15(1). The *Law* analysis traces the traditional three step approach, enquiring first whether a law imposes differential treatment between the claimant and others; and second, whether one or more enumerated or analogous grounds is the basis of that distinction. The third step in the

Note: It is easy to understand the temptation to resort to a *Charter* analysis in cases in which a claim is made against the government for allegedly discriminatory provision of a service. These are cases which could as easily have been brought under the *Charter.* However, the tendency to draw on the *Law* test has been evident even in cases in which the respondent is a private actor, or at least not an organization to whom the *Charter* applies, or cases in which a government respondent is challenged for its actions as an employer. For example, in ***Manitoba High Schools Athletic Assn. v. Pasternak* (2008) 62 C.H.R.R. D/163**, the complainants were twin teenage girls who were denied the opportunity by the Manitoba High School Athletics Association (MHSAA) to try out for the boys hockey team at their high school (WCKI). On an application for judicial review, the MHSAA challenged the Tribunal's finding with respect to the *prima facie* case by arguing that the Tribunal was wrong not to apply the *Law* test, which, the respondent argued, required not only establishment of differential treatment on the basis of sex, but also that the differential treatment violates dignity. The MHSAA argued as follows:

> [58] The MHSAA argued that the Pasternaks were required to demonstrate that the prohibition in its policies and rules against playing on the male hockey team, where a female team was available, violated their human dignity in addition to being labelled as discriminatory conduct. It was, therefore, necessary for the Adjudicator to find that the Pasternaks had experienced adverse differential treatment on the basis of gender and, further, that such treatment had violated their dignity. There was argued to be no such violation, or evidence of a violation, to the dignity of the Pasternaks. Further, there was no evidence that the MHSAA in any way promoted the concept that female athletes were less capable than their male counterparts. Indeed, the object of the imputed rule was to encourage participation, fitness, leadership skills and school spirit for all participants. There was an absence of negative stereotyping with respect to women's hockey. There was also argued to be reasonable accommodation accorded by the MHSAA rule. Accordingly, it was argued that a case of *prima facie* discrimination had not been established, nor had an infringement of dignity, in all the circumstances of this matter.

Although the court agreed with the Tribunal that the *Law* test was more appropriate to cases with 'governmental overtones' than to disputes between private actors, it analyzed the *prima facie* case issue as follows:

> [67] I find, as did the Adjudicator, that being treated on the basis of an individual's personal merit, as opposed to personal characteristics such as gender, is the essence of substantive equality. The Adjudicator, in reaching her decision, applied a substantive equality approach. She determined that the men's team played a more challenging and competitive level of hockey. The women's team at WKCI was competing in its first season and its level of competitiveness was in no way comparable to that offered by the men's team. Further, I have accepted the finding of fact that the men's and women's "game" remains substantially different. The Pasternaks were denied the opportunity to try out or to complete the try-out process for the men's team and, consequently, were denied the chance to be judged on the basis of their personal merit.
>
> [68] Without question, the female team at WKCI operated with the same funding, ice time and other accommodations as existed for the men's team. However, the Adjudicator correctly evaluated that this matter was not one related to an issue of reasonable accommodation. The Pasternaks sought to be afforded the opportunity to compete for placement on the male team, which represented a higher level of hockey in terms of competitiveness and skill. The men's team has competed in the "B"

Chapter 10: Finding Discrimination in Discrete Interactions: Differential Treatment *Because of* a Prohibited Ground Revisited

Note: In Chapter 2, we outlined three paradigmatic types of fact situation giving rise to discrimination complaints. The *O'Malley* and *Etobicoke* kinds of cases rely on the existence of a rule – whether explicitly using a prohibited ground or neutral in form – to connect the effects of the respondent's conduct to a prohibited ground. We turn now to a more thorough examination of the third type of fact situation, in which it is not clear that there is any sort of rule or policy from which a pattern of effects can be observed. Earlier we used *Shakes v. Rex Pak* (Vol 1, Ch. 2, p. 57) to exemplify this kind of case.

We might describe these cases as adopting a 'reason-based' account of discrimination, rather than a purely effects-based account. The early cases of this type treated 'discrimination' as involving acting on *certain* reasons that make the action wrongful, namely prejudice. On this account, prejudice would be a prohibited reason for refusing to hire, for example. Prejudice is certainly a bad reason for making a variety of decisions, but is it the *only* type of reason human rights law should want to rule out or scrutinize? The early cases tended to treat prejudice as necessary, and also require that it be conscious, and these two elements have often been fused together and labeled "intentional discrimination". This produced an extremely narrow definition of discrimination, although it is one still intuitively accepted by many.

Once we recognize prejudice as one reason for using a prohibited ground as a basis for exclusion, we may notice that it is only one of many possible ones; we may also then question whether it should be necessary that the operative reason was conscious. It is worth prying apart the idea of whether discrimination law is interested in reasons for the respondent's action from whether the specific sort of reason that prejudice is is necessary because there are many discrimination complaints to which an effects-based definition, as inaugurated by *O'Malley*, seems ill-suited. An assessment of reasons may be necessary in these cases without a focus on reasons dragging us back to a focus exclusively on prejudice.

Many complaints involve no apparent rule or policy the general effects of which can be observed. Instead, they involve an interaction between two individuals in which one makes an unfavourable decision about the other: C applies for a job, but R rejects her in favour of another candidate. Was the rejection because of a prohibited ground? It is hard to see how we could decide without knowing more about the respondent's reasons. But it doesn't follow that we must be looking for a specific reason, namely prejudice against certain people. If the legislature had wanted to it could have recognized only the right that employers not refuse work because they are prejudiced against one's race, sex, etc. Instead, the right protected is to equal treatment without discrimination because of various grounds. This suggests that discrimination means differentiating between people because of a prohibited ground, treating someone differently because of her race, or sex, etc. Using the ground itself – race, for example – as the reason for the different treatment is what makes conduct discriminatory. This also provides a way of describing cases like *Christie* without relying on intention, as such: the plaintiff's race was the reason he was refused service. Prejudice, where it exists, may be an ulterior reason providing a deeper explanation of why the ground was used as a reason, but many other ulterior reasons might be operative instead.

For example, in ***Giguere v. Popeye Restaurant* (no 4)**, CHRR Doc. 08-026, the complainant claimed she had been fired from her job as a waitress because her spouse was HIV positive. The Tribunal found that although the respondent held no bias against the complainant, she was responding to customer complaints about being served by a waitress exposed to HIV. This was sufficient to make the firing discriminatory, according to the Tribunal. The respondent's reason for her decision was the views of her customers, not

prejudice on her part. The Tribunal's survey of the cases explores the rationale behind this approach:

> [74]...Based in large part on human rights statutes enacted in the 1960s, courts and tribunals have consistently held that it is no defence to a claim of discrimination that customers prefer not to be served by an individual identified by race, gender, disability or any other ground prescribed in the *Code.* Subject to a specific exemption in the *Code,* a business owner is not entitled to set qualifications for a job based on the preference of customers. A business owner is not entitled to terminate an employee because they feel that business will suffer because of the views of customers, where those views are related to proscribed grounds of discrimination. (See: *Berry v. Manor Inn* (1980), 1 C.H.R.R. D/152 (N.S. Bd.Inq.); *Imberto v. Vic and Tony Coiffure* (1981), 2 C.H.R.R. D/392 (Ont. Bd.Inq.); *Hajla v. Nestoras* (1987), 8 C.H.R.R. D/3879 (Ont. Bd.Inq.); *Varma v. G.B. Allright Enterprises Inc.* (1988), 9 C.H.R.R. D/5290 (B.C.C.H.R.); *Mohammad v. Mariposa Stores Ltd.* (1990), 14 C.H.R.R. D/215 (B.C.C.H.R.).)
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> [75] The rationale for this principle was set out in *Berry, supra,* at § 1358:
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> > To say that the preference of an employer's customers or clients to have either males or females serving them, which preference results in economic differences for the employer, is a *bona fide* occupational qualification based on sex, would be tantamount to creating a "community standard" test to determine whether discrimination exists. It would be a minor extension of this principle to hold that if most customers in a restaurant held prejudices against Blacks or Jews or Scotsmen, the proprietor would be legally entitled to refuse to serve Blacks or Jews or Scotsmen. The long history of human rights struggles on this continent and elsewhere can leave no doubt that such an argument is totally without merit.
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> [76] In *Hajla, supra,* the Ontario Board of Inquiry dealt with a complaint by a woman who had epilepsy and was denied entry to a restaurant on the basis of her disability. The restaurant owner feared that the complainant's presence in the restaurant would have an adverse impact on customers patronizing the restaurant and would cause business to suffer. In finding that the restaurant owner had breached the *Code,* Board Chair Cumming wrote, at § 30731–32:
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> > The motivation underlying the respondent's discrimination because of handicap [now disability] was that he feared he would lose some of his customers if the complainant continued to frequent the restaurant. The respondent had a clear intention to discriminate; just as clearly, he did not have any evil or malicious motive underlying his intent to discriminate. He was worried about the impact upon the other customers through the complainant being in his restaurant. However, it is well established that it cannot be a defence of a respondent to assert that he only discriminated because of the perceived or real preferences of customers. There are many decisions which have held that it is not a defence to say that one discriminated as a matter of business or economic advantage or necessity, to meet the wishes of other persons, such as customers, tenants or employees. See, for example, *P.G. du Québec c. Service de Taxis Nord Est (1979) Inc.,* (1986), 7 C.H.R.R. D/3112; *Iberto Imberto v. Vic and Tony Coiffure* (1982),

> 2 C.H.R.R. D/392 at D/397 (McCamus, Ont. Bd.Inq.); and *Scott v. Foster Wheeler Limited* (1985), 6 C.H.R.R. D/2885 (Hunter, Ont. Bd.Inq.).
>
> More generally put, one cannot break the law because another person wants or encourages the transgressor to do so. Any other approach of the law would tend to defeat the public policy objectives in human rights legislation. It would be absurd for the law to allow a defence for factors which go directly contrary to the public policy that the law is seeking to put into effect.
>
> [77] Businesses are required to comply with the *Code*. Businesses are not required to comply only when it is economically advantageous or economically neutral. Businesses are required to comply even if they feel there is an economic risk or disadvantage. Economic interests and rights do not trump human rights, unless there is a specific exemption in the legislation.

Similarly, Tribunals have long held that an employer who denies employment to a woman out of concern for her well-being, wanting not to expose her to unladylike working conditions, may not be prejudiced but is still discriminating because of sex. In these examples, the respondent's ulterior reason is not prejudice, but might be regarded as equally problematic from a legal point of view. In any event, in such cases, the prohibited ground is part of the reason for refusal to hire. We can reconstruct the respondent's reasons by saying that the restaurateur fired the waitress because her spouse is HIV positive because her customers didn't like being served by her. We might even say we don't much care what the ulterior reason is as long as one of the prohibited grounds was a reason for exclusion.

If all cases were like either *Etobicoke* or *O'Malley* we might well say that the effects-based approach obviates attention to reasons. But the situations in which there is no apparent rule or policy cannot be so easily subsumed in an effects-based account, and these still make up a significant part of the case load. When someone applies for a job and doesn't get it, how do we know whether it was *because of* a prohibited ground? How do we know it was her sex, for example, that explains why she didn't get the job? Without a formal rule or general practice, how can we ascertain differential treatment connected to a prohibited ground? It may turn out that analyzing the respondent's ulterior reasons is crucial. Focusing on reasons rather than intention opens the door to considering a wide array of reasons and how they might support a conclusion of discrimination because of a prohibited ground. Whether those reasons must be conscious to explain a finding of differential treatment should also be an open question. If consciousness is not necessary, we would finally be able to relegate 'intention' to the past, while still allowing a reconstruction of the respondent's reasons to play a role.

However, ascertaining the reasons that explain a respondent's behavior in these cases is not always easy. As William Black noted ("From Intent to Effect: New Standard in Human Rights" (1980) 1 CHRR C/1), speaking about the need to prove intention, "The only cases that were easy to prove were those involving respondents who openly admitted bias or took no steps to conceal it, either because they were proud of their prejudices or so unaware of current standards as not to realize the implications of their admission." Without direct knowledge of the respondent's reasons, and in the absence of a clear expression of his reasons, as was available in *Christie*, the adjudicator must draw whatever inferences seem appropriate from circumstantial evidence. This can be a complex task; the cases in this chapter are meant to give you a taste of it.

Note: As we have already seen in *Shakes*, in cases involving discrete interactions between individuals, the analytical framework of *O'Malley* has been borrowed, suggesting that the complainant needs to establish a *prima facie* case, whereupon the respondent is called upon to explain. But it can be harder in these cases to draw a clear line between the *prima facie* case that the complainant must establish and the second stage of probing the respondent's exculpatory explanations. This has given rise to some controversy about what must be proven as part of the *prima facie* case. In ***MacAulay v. Port Hawkesbury (Town)*** (2008), 63 C.H.R.R. D/85 (N.S. Bd.Inq.), the complainant claimed that she was discriminated against because of her sex when she applied for a job as a carpenter. The tribunal put the following gloss on the test in *Shakes*:

> [20] The standard of assessing the evidence before a Board of Inquiry is on the civil balance of probabilities. If the board is satisfied on balance that the complainant has proved the discrimination alleged and there is no justification or defence available to the respondent, then the board may uphold the complaint and fashion a remedy. If the board is not so satisfied, then it may dismiss the complaint.
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> [21] It is the complainant who bears the initial onus of establishing a *prima facie* case as stated by the Supreme Court of Canada in *O'Malley v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 at § 24782:
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> > . . . The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. . .
>
> [22] But what exactly does this include? ... This Commission recommends the ... approach in the text set forth in *Shakes v. Rex Pak Limited* (1981), 3 C.H.R.R. D/1001 at § 8918 (Ont. Bd.Inq.):
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> > Proof of discrimination is almost invariably by circumstantial evidence. Only rarely at a Board of Inquiry will there be an admission by the respondent or other direct evidence. In an employment complaint, the Commission usually establishes a *prima facie* case by proving (a) that the complainant was qualified for the particular employment; (b) that the complainant was not hired; and (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e., race, colour, etc.) subsequently obtained the position. If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the *Code* is not the correct explanation for what occurred. If the respondent does proffer an equally consistent explanation, the complaint of discrimination must fail for the onus of proving discrimination ultimately rests on the Commission. . .
>
> [23] I find the *Shakes* test to be incomplete. It requires a presumption that the reason a person possessing a distinguishing characteristic protected in ss. 5(1)(h) to 5(1)(v) does not get a job before someone else who has equal or lesser qualifications, must have had something to do with that distinguishing characteristic. This is an unacceptable presumption for not only does it fail to consider the multitude of other considerations that may impact the hiring process, but it negates the requirement to prove one of the main ingredients in a finding of discrimination – that the protected characteristic played some role in the adverse treatment. The simple fact that the complainant did not get the job does not equate to adverse treatment.

[24] It is my opinion that, if we are to accept that in establishing a *prima facie* case in employment complaints, one has only to show that a person without the protected characteristic got hired ahead of another person of equal qualification who does possess the protected characteristic, the bar has not left the ground. In essence, the allegation becomes the proof. Consequently, accepting such a presumption is tantamount to negating altogether the onus of proving a *prima facie* case.

[25] There must be some further ingredient to support a reasonable inference that the complainant suffered adverse treatment because of the protected characteristic. This is better stated by Tribunal member Lindsey Lyster in *Preiss v. British Columbia (Attorney General) (No. 3),* 2006 BCHRT 587 [reported 58 C.H.R.R. D/378] who sets forth the test in the following terms [at § 216]:

> . . . in general, the complainant must establish three things: first, that he is, or is perceived to be, a member of a group possessing a characteristic or characteristics protected under the *Code;* second, that he suffered some adverse treatment; and third, that it is reasonable to infer that the protected characteristic played some role in the adverse treatment. This is what is known as the traditional *prima facie* approach.

[26] I prefer the *Preiss* test as it is more in harmony with the *O'Malley* definitions and more reflective of the realities that normally surround a hiring process.

[27] In the present circumstances, gender, by its mere presence, cannot automatically be accepted as playing a role in the decision not to hire Ms. MacAulay. A *prima facie* case has not been proven until there is some evidence that supports a finding that her sex had something to do with the decision.

In ***Basi v. Canadian National Railway Co.*** *(1988), 9 C.H.R.R. D/5029 (C.H.R.T.)* CN advertised a position for a "heavy duty mechanic". Mr. Basi applied and went for an interview. He claimed that the interview was short, and the interviewer, Mr. Symenuk, was rude. Mr. Symenuk denied being rude, and said all the interviews he conducted (44 in total) were similarly short. To select the successful applicant from the 44 applications, Mr. Symenuk testified that he went through each of the applications looking for outstanding applicants. None were outstanding. He was instructed by his manager to create a shortlist of 5. To do this he went through the applications in the order in which they were received until he found 5 with the necessary qualifications. He found 5 qualified candidates in the first 15 or 16 applications he reviewed. These were invited for a second interview and the successful candidate was chosen from them. Mr Basi's application was not in the first batch of applications reviewed. The Tribunal accepted this as a "reasonable explanation that is equally consistent with the conclusion that discrimination on the basis prohibited by the *Code* is not the correct explanation for what occurred." This shifted the final evidentiary burden back to the complainant "to show that the explanation provided is pretextual and that the true motivation for the employer's action was in fact discriminatory." About discharging this burden the Tribunal said:

38481 To accomplish that end the complainant would have a herculean task were it necessary for him to prove, by direct evidence, that discrimination was the motivating factor. Discrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised.

38482 Since direct evidence is rarely available to a complainant in cases such as the present it is left to the Board to determine whether or not the complainant has been able to prove that

the explanation is pretextual by inference from what is, in most cases, circumstantial evidence:

> Discrimination on the grounds of race or color are [sic] frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is at issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises. [*Kennedy* v. *Mohawk College* (1973) (Ont. Bd. Inq.) (Borons) [unreported].]

38483 In many instances, tribunals have taken the view that the inference of discrimination that must be drawn from the circumstantial evidence in order to support the complainant's case:

> must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. [*Kennedy* v. *Mohawk, supra.*]

38484 It seems to me that a test of that nature is too severe, particularly under the present circumstances. It is virtually undisputed that discrimination *generally* must be established according to the civil standard of proof, that is: by a preponderance of evidence on a balance of probabilities. [*Israeli* v. *C.H.R.C., supra; Bhinder* v. *CNR* (1981), 2 C.H.R.R. D/546; aff'd 1985 2 S.C.R. 561]

38485 It follows therefore that in establishing the circumstantial evidence, a complainant should face no more onerous a test than he would in proving his case generally in the ordinary course. To require the complainant to meet the test enunciated in *Mohawk College, supra,* would essentially require him to meet a criminal standard of proof in establishing the circumstantial evidence, when in fact the pervasive burden throughout the entire case is only on a balance of probabilities.

38486 I am persuaded by the logic employed by B. Vizkelety in her recent book *Proving Discrimination in Canada* (Toronto: Carswell, 1987), where she states at 142:

> it is suggested that the *Kennedy* (v. *Mohawk College*) standard reflects a criminal as opposed to a civil standard of proof and that, as such, it is too rigid. There is indeed, virtual unanimity that the usual standard of proof in discrimination cases is a civil standard of preponderance. The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard, may therefore be formulated in this manner: an *inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.*

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The Tribunal went on to consider whether the Board's selection process could be justified even if the complainant had been able to make out on adverse effect on him as a South Asian. The Tribunal concluded that the use of structured interviews was justifiable because part of a vice-principal's job involved interviews with parents, Board administrators, and principals requiring the skills tested for by the job interview. Although the Tribunal criticized the Board's process for being less transparent than it should have been, and argued that these flaws made it easy for the complainant to think he had been discriminated against, the problems affected all candidates rather than specifically those who were South Asian.

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Note: The complainant had more success in ***Wong v. Ottawa Board of Education (No. 3)*** (1994), 23 C.H.R.R. D/41 (Ont. Bd. Inq., H. Albert Hubbard). Mr. Wong was one of two teachers who taught auto mechanics. In 1989, he was informed by a new principal, Alan Wotherspoon, that he was being placed on that year's list of teachers to be declared surplus to the needs of the school. He was moved to a new school the next September. Of the two teachers who taught auto mechanics, Mr. Wong had the most seniority, and he had an excellent teaching record. He was placed on the surplus list because Mr. Wotherspoon decided that the other teacher, Mr. Logan, made a greater contribution to extra-curricular activities at the school.

The fact that Mr. Wong kept his classroom open over the lunch hour and before school to provide extra time and assistance to his students, and that he was a role model for the visible minority students was not taken into account in assessing his extra-curricular activities. The Board of Inquiry heard evidence that persons of Chinese origin are more likely to participate in activities directly related to education, such as spending extra time with students, because education is highly valued in Chinese culture; they are less likely to be involved in activities that are more social in character, such as the "Thank God It's Friday" sessions and breakfast meetings which some staff members attended regularly. There was considerable evidence about the so-called T.G.I.F sessions attended by many of the teachers. This form of socialization was one with which Mr. Wong was uncomfortable, a commonplace reaction of Chinese immigrants according to expert evidence dealing with their acculturation in Canada. Mr. Murphy, the vice-principal and a close advisor of Mr. Weatherspoon, whose contact with Mr. Wong was admittedly minimal, said he knew Mr. Logan very well and he acknowledged that he and Mr. Logan attended these "Thank God It's Friday" sessions along with other staff members. He could not recall ever seeing Mr. Wong at these sessions. Mr. Wotherspoon also focussed on committee work in the assessment of extra-curricular activities, and failed to consider relevant extra-curricular activities in which members of a visible minority would be most likely to participate.

In drawing the connection between culture and the negative consequences of the Principal's policy, the Board said:

> [104] Dr. Wong-Rieger, who was qualified as an expert with respect to Chinese acculturation in Canada, testified that Chinese immigrants (such as Mr. Wong) are culturally reluctant to engage in activities that involve or emphasize socializing, or to volunteer for certain kinds of activities in the workplace that are not perceived to be closely linked to their work. In the context of the teaching profession, she indicated that Chinese people have a very high regard for education and activities related directly to learning and would have no difficulty getting involved in extra-curricular activities having to do with their subject-areas, but would be most reticent to enter into activities they perceived as peripheral. She suggested (in Vol. 2, at p. 172) that:

> We consider in North America our schools to be not only instruments of education but instruments of socialization . . . and if we look at the research in terms of what the value of education is from a traditional Chinese perspective it is very much in terms of the educational aspects rather than in terms of the social aspects of it.

...

[108] Mr. Wong's view of what amounted to important extracurricular activities was obviously a function of his Chinese culture. In the light of the evidence of everyone but the principal, his actual contributions were well within the ambit of any meaning that could reasonably be given that nebulous term. He was not made aware that what he might see as important extra-curricular activities would not be so regarded by the administration, much less that such actual contributions of his would not be classed as extra-curricular and would therefore be totally disregarded. Thus, I would conclude that even if Mr. Wotherspoon did not discriminate directly against the complainant because of his race and ethnic origin, the Commission has made out a *prima facie* case of adverse effect, or constructive, discrimination against him. Mr. Wong's right under Part I was infringed because a factor used in respect of him (a restrictive view of extra-curricular activity) which, even if not ex facie unlawfully discriminatory, resulted in differential treatment of a group of persons (visible minorities) identified by a prohibited ground of discrimination (race and ethnic origin) of which group the complainant is a member, which factor is not reasonable and *bona fide* in the circumstances.

...

[110] It was also submitted by the respondents that adverse effect discrimination cannot be found in the circumstances of this case because the complainant does not belong to a sufficiently well-defined group all the members of which are similarly at risk. In support of this contention *Malik v. Ministry of Government Services* (1981), 2 C.H.R.R. D/374 was relied on. That case arose under the *Human Rights Code*, R.S.O. 1970, and it was one of the early Ontario decisions dealing with adverse impact discrimination. In *Malik*, the respondent submitted that the concept of "indirect discrimination" could not even be used in cases under the legislation as it then existed. Citing a 1977 Ontario board of inquiry decision, the Board in *Malik* rejected that argument but held that indirect discrimination could not be found on the facts before it, noting (at p. D/379, para. 3374) that:

> . . . The "indirect discrimination" approach was developed in the U.S. in cases dealing with very broad groups of persons, first blacks then women. In Singh v. S.I.S., its use in Ontario was begun in a case involving a broad grouping where it could be assumed that all, or most, members of a well-defined group would be hurt by the requirement. In this case the group is ill-defined; its boundaries depend on intangibles like "upbringing," "culture," the degree of modernization or Westernization in a person's country of origin, and the length of time in Canada. All in all, the policy and factual basis for acceding to an argument of indirect discrimination here is just too remote.

[111] In attempting to apply this to the circumstances of the present case, counsel for the respondents suggested (Vol. 10, p. 214) that the evidence of Dr. Wong-Rieger indicated:

> . . a big degree of difference in socialization and assimilation between immigrants [such as Mr. Wong] and their first generation children [and that] perhaps this has an adverse impact on recent immigrants to the country, but not on first or second

> generation. That's not what the protection of the Human Rights Code is all about, it is about protecting a well-defined group against discrimination.

[112] I am taken aback by the suggestion that the *Human Rights Code* is not about protecting immigrants from indirect discrimination that can be brought home to their race or ethnic origin unless non-immigrant members of that race or ethnic group would likewise suffer adverse effect discrimination in similar circumstances. Be that as it may, the present legislation differs in important respects from that which was in place when *Malik*, *supra*, was decided, and considerable jurisprudence has intervened. The "group of persons" to which s. 11(1) of the Code ... has reference is one the members of which "are identified by a prohibited ground of discrimination and of whom the person is a member." This is a clear reference to s. 5(1) which states that "Every person has a right to equal treatment with respect to employment without discrimination because of race . . . place of origin . . . ethnic origin." Mr. Wong belongs to many groups: males, teachers, parents, Canadians, immigrants, and so forth. Being Chinese, he is also a member of a group of persons identified by race and ethnicity upon which ground discrimination is prohibited. Mr. Wong's inhibitions and predilections do not exist because he is an immigrant, but because he is Chinese. While s. 11(1) might be taken to indicate that the factor alleged to be the source of discrimination should have an adverse effect upon the group so identified, in my submission that which affects some members of a group because they belong to that group affects the group as such. In any case, if the factor the application of which is the subject of the complaint must have an adverse effect on the entire group of persons identified by a prohibited ground of discrimination, surely "immigrant Chinese" qualifies since that group is identified by place of origin (another prohibited ground) as well as by race.

[113] It is clear that Mr. Wong's inhibitions (his reticence to socialize or to seek involvement in committees not perceived to be directly related to his primary role as a teacher) and, even more importantly, his predilections (his value system that placed spending non-scheduled time with his students ahead of other extra-curricular activities) were a function of his Chinese culture and ethnic origin. Even if subject to some degree of generational erosion (although the evidence of Ms. Soo Wong speaks to their tenacity), such inhibitions and predilections are a function of his race and ethnic origin, and not simply of his immigrant status viewed without regard to his place of origin. The respondents imposed an unnecessarily restrictive criterion which, because of their inhibitions and predilections, was inherently prejudicial to a group of persons identified by race, ethnic origin and place of origin, to which group the complainant belongs. In my opinion, they thereby infringed Mr. Wong's s. 4(1) [now s. 5(1)] right to equal treatment in employment through adverse effect discrimination.

Note: One issue in *Bhadauria* was the use statistical evidence to support an inference of discrimination. In ***Abdolalipour and Murad v. Allied Chemical Canada Ltd.,*** [1996] O.H.R.B.I.D. No. 31 (Ont. Bd. Inq. (P. Mercer)), each of the Complainants claimed that he or she was not hired into a permanent position with the Respondent because of race. The Commission relied on evidence about various aspects of the workplace environment in order to make out the *prima facie* case, but also made a more ambitious argument that the Tribunal could infer race-based decision-making from the relatively low percentage of racialized people in the Respondent's workforce compared to the surrounding population. The Tribunal dealt with the argument as follows:

> [190] Racial discrimination, like discrimination on the basis of gender is most likely to operate not consciously but through assumptions and biases that are largely unconscious; see the remarks of the Ontario Court of Appeal in *R v. Parks* (September 23, 1993) and the decision of the Ontario Board of Inquiry in *Richard v. Waiglass*, *supra*, at page 16. It follows that attitudes tainted by racial bias are more likely to influence a workplace where there has been no active or systematic encouragement to examine the assumptions on which subjective evaluation and hiring processes operate. It also follows, given the clear societal recognition that explicit racial comments are unacceptable that the simple absence of such comments by itself says little about the existence of attitudes that are unconsciously tainted by racial biases and this could equally be said for gender discrimination.
>
> [191] The Commission forcefully advances the view that a racially homogeneous work force is a strong indicator that racial biases and attitudes are present in the workplace. Typically, when Boards of Inquiry have considered whether conclusions can be drawn about hiring practices from a review of workforce profiles, they have concluded that the lack of applicant flow data means that no reliable conclusions can be drawn. The Commission urges me to adopt a principle that where census data indicate that the representation of racial minority employees in a particular workforce is lower than the representation of members of racial minorities in the surrounding area, the conclusion should be drawn that racial bias exists in the hiring process in the absence of any reason to believe that the applicant pool is less than representative. I am further urged to place the evidentiary burden on the Respondents on the basis that they control the information about who was applying. I agree that evidence about the representation of racial minority employees in the work force relative to the representation in the surrounding area of population is appropriate for consideration as one factor that a Board of Inquiry would be expected to take into account. However, I am not satisfied that the fact of a disproportion should by itself warrant a conclusion that racial bias exists in the absence of the Respondents discharging the burden of proving that the applicant pool was unrepresentative. Equally, I am not willing to accept the conclusion apparently drawn by Ms Khan [the Commission's expert witness] that a person in a racially homogenous work environment inevitably faces "massive exclusion, isolation and alienation within the work place". Indeed, the testimony of the complainants in this proceeding does not bear out that conclusion.

In ***Tahmourpour v. Royal Canadian Mounted Police*** (2008), CHRR Doc. 08-202, 2008 CHRT 10, the complainant claimed, *inter alia*, that he received poor evaluations in part of his training as a cadet at the RCMP Training Academy because of his ethnicity and religion. The Tribunal assessed the statistical evidence presented in support of his claim as follows:

> [148] Mr. Tahmourpour has established a *prima facie* case that his abilities in the program were not assessed fairly on the Cadet Performance Feedback Sheet and in the

8. That the respondent Ministry pay to the complainant and to Vicki Shaw-McKinnon the differences in remuneration between what they actually received and what they would have earned had they been promoted to the rank of OM14 following the competition held in March 1989, and subsequently to the rank of OM16 at the date other staff of rank OM14 were automatically reclassified, together with appropriate pre-award interest thereon, such sums to be calculated by counsel or referred to me if they are unable to agree.

9. That the respondent Ministry relocate the respondent Frank Geswaldo, and that it ensure that neither he nor the respondent Phil James work in the same institutional facility as the complainant at any future time.

10. That the Ministry: (a) amend its records to correspond with part 6 of this order so as to ensure that the complainant's absences from the workplace caused by work-related stress since the date of the first complaint are not reflected in those records and are not used in respect of any decisions that might affect him; and (b) provide access to the complainant's and his wife's personnel file by the Ontario Human Rights Commission in order that it satisfy itself that certain materials relating to the various human rights complaints are removed and destroyed.

11. That within thirty days of the making of this award the respondent Ministry cause this series of orders (or such other text as counsel may agree upon) to be read at parade for five consecutive days, and that it attach a copy thereof to the pay slips of Metro East Toronto Detention Centre personnel and publish it in the institutional newsletter, *Correctional Update,* or such other publication as may be appropriate.

12. That the respondent Ministry establish at its own expense a human rights training program that meets with the approval of the Ontario Human Rights Commission, which may be called upon for assistance in that regard, such program to be conducted within six months of the date of this award.

[354] I shall remain seized of this matter until such time as these orders have been fully complied with so as to consider and decide any dispute that might arise in respect of the implementation of any aspect of them ...

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Note: In ***McKinnon v. Ontario (Ministry of Correctional Services) No.7*** (2002), 45 C.H.R.R. D/61, Board of Inquiry Hubbard reconvened to deal with allegations that the orders issued in McKinnon No. 3 had not been complied with since that decision was handed down in 1998. The Board was first asked to reconvene in March, 1999, and decided in May, 1999 that, while it could not deal with new complaints of discrimination, it had jurisdiction to consider whether the orders made in the 1998 decision had been implemented. Judicial review of that decision was sought, but denied, and in June 2001, the Board reconvened to consider the substance of the allegations.

The Board concluded that the Ministry had failed quite egregiously to comply with the 1998 orders. In a lengthy and complex ruling the Board found:

- The Ministry virtually ignored the time limits for implementing a human rights training programme as required by Order 12, not contacting the Human Rights Commission for its approval, as required, until the six month time limit was almost up. In the end, a training programme was not approved until three months after the deadline, and was not operational for another three months. (The Commission was also criticized for not having been more vigilant.)

- The training programme implemented consisted of adding a small anti-racism component to a programme already being developed to respond to other human rights complaints that had arisen. The programme consisted of a one day workshop, which was criticized for trying to cram too much into too short a space of time.
- Although managerial participation in the training sessions was contemplated and required to respond to the problem, the evidence was that managers frequently did not attend, despite repeated requests from the programme facilitators.
- The anti-racism component was held to be completely inadequate, trivializing McKinnon's experience rather than educating people about the harms of a workplace atmosphere poisoned with racism. (Again, the Commission was also criticized for having approved this as an adequate anti-racism training programme.)
- The Ministry paid the damage awards levied against the individual respondents in *McKinnon No. 3* on their behalf, thus eliminating any deterrent effect they might have had. Frank Geswaldo, whom the Board had ordered moved to another position so that McKinnon would not have to work with him, was given a 'going away' party by management at the Toronto East Detention Centre in recognition of his service.
- Meanwhile, McKinnon continued to suffer ostracism and obstructionism from his co-workers and supervisors, and senior management continued to allow this to happen.[11]

After considering argument as to whether the Board had jurisdiction to "craft new orders" to better enforce the original ones, Chairman Hubbard concluded:

> [233] Given the flagrant character of the Ministry's noncompliance, the additional harm to the complainant occasioned thereby, and the hardship and waste of time and resources involved in restarting the process to deal with matters that this Board was appointed to hear, in my opinion the broad and liberal view to be taken of a Board's authority under s. 41(1)(a) of the *Code* must be seen to run to "the crafting of new

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[11] Hubbard summarized the evidence on this point as follows:

> In my opinion, the evidence of workplace events affecting the complainant, both directly and indirectly, in the four years following this Board's 1998 decision is further proof that its atmosphere remains racially poisoned for him. As that decision shows, the complainant put up with racial abuse for years before turning on his tormentors. He fought back, lodging complaint after complaint, using the grievance process and other avenues available within the Ministry before (and after) filing various complaints with the Human Rights Commission. He was met with reprisals and further harassment and discrimination. And when he was vindicated by this Board in the Spring of 1998, the individual respondents who had tormented him were left almost unscathed, the consequential damages assessed against them having been paid by the corporate respondent. The complainant, however, having dared to buck the system, was met with widespread scorn and subjected to name-calling and subtle attacks in the form of false allegations, frivolous grievances and denied training opportunities. As to management's investigation of his concerns, the complainant was met with refusals, delays, bias, incompetence, the twisting of facts, the withholding of information, and unjustified inquiries about, and findings against, him.
>
> Would each and every one of the incidents reviewed, considered in and of itself, constitute a breach of the *Code?* Of course not. Would any one of them taken alone demonstrate that the workplace environment was poisoned? Probably not. But when examined collectively, do they reveal a workplace environment that remains poisoned for the complainant? Absolutely.

F. Final Responsibility

15. The Deputy Minister of the Ministry of Correctional Services shall bear the ultimate responsibility for the implementation of these orders.

[313] I shall remain seized of these matters until such time as this entire series of orders has been implemented and the complainant's remedial right to full compliance with the *Code* in respect of future practices has been satisfied in substantial conformity with the orders as read in the context of the findings, conclusions and reasons found in this decision and in the April 1998 decision of this Board. If the parties are unable to agree with respect to any of the matters regarding which their common approval is required, or if there are any other matters relating to implementation of these orders that are in dispute or appear to require clarification, I am to be contacted without delay so that I may hear and decide such matters.

Note: The Ministry immediately appealed the Tribunal's decision. The Ontario Divisional Court, in ***Ontario (Ministry of Correctional Services) v. Ontario (HRC) (No. 4)*** (2003), 51 C.H.R.R. D/440 dismissed the appeal. That decision and its reasons were upheld by the Ontario Court of Appeal ((2004), CHRR Doc. 04-419). The Divisional Court drew upon the reasoning of the Supreme Court in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63 (QL) [[2003] 3 S.C.R. 3] as follows:

That case dealt with the reservation by a trial judge of supervision over an order made where there had been a breach of language rights guaranteed by the *Charter*. The comments of the majority in *Doucet-Boudreau* are appropriate, since human rights have been accorded similar constitutional protection (at § 72 and 87):

> The difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be awarded. Nonetheless, courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies (see *Sharpe, supra,* at paras. 1.260-1.380; *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board,* [1910] 1 Ch. 48 (C.A.), aff'd [1912] A.C. 788 (H.L.); *Kennard v. Cory Brothers and Co.,* [1922] 1 Ch. 265, aff'd [1922] 2 Ch. 1 (C.A.)).
>
> Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

...

[16] The requirement that the program be conducted within six months was not met. The [Board] found further non-compliance with Order No. 12 in that the training program provided was not as contemplated by Order No. 12 and the training program delivered was not that which was approved by the Commission.

[17] In our opinion, there was evidence before the [Board] sufficient to support these findings.

[18] The question then becomes whether, having found non-compliance, the [Board]'s role was at an end, requiring the complainant to return to the Commission to begin anew with a fresh complaint. We think that approach would be contrary to the intent of the *Code,* the purpose of which is remedial: to eradicate discrimination (see *Grover v. Canada,* [1994] F.C.J. No. 1000 (QL) [24 C.H.R.R. D/390]).

[19] The finding of a poisoned workplace in which the complainant was continuously and repetitively harassed by his co-workers, made by the [Board] at its original hearing in 1998, was found in the November 29, 2002, decision to have continued unabated. The [Board] attributed the cause in part to the failure of the Ministry to comply with Order No. 12. To determine whether there had been compliance, it was necessary for the Tribunal to hear evidence as was contemplated by this Court, differently constituted, in its decision in this matter in *Ontario v. O.H.R.C.,* [2001] O.J. No. 1016 (QL) [39 C.H.R.R. D/308].

[20] This does not appear to us to be embarking upon a fresh inquiry. Rather, it is the exercise of the [Board]'s supervisory role to ensure delivery of an effective remedy. We are of the opinion that it was open to the [Board] as part of its ongoing obligation to oversee implementation to recast its original orders to meet what it found to be a continuing problem.

[21] We are not [to] be taken in these reasons as holding that supervisory jurisdiction is unlimited so as to invite fresh post-decision evidence of differing acts of discrimination from those originally adjudicated. We are limiting our interpretation of supervisory jurisdiction in accordance with the decision in *Doucet-Boudreau v. Nova Scotia (Ministry of Education, supra.* We are confronted in this appeal with a unique situation in which outrageous discrimination continued unabated for a period of approximately fifteen years and in which the [Board]'s original remedial orders appear to have been at least in part, subverted. It should also be noted that the position of the Commission as to the effectiveness of the proposed human rights training program moved from being supportive of the proposal in 1998, to submitting that it was ineffective in 2002.

Note: The "third party" referred to in Order No. 14 in the 2002 Tribunal decision was nominated by the Commission in January of 2003. The organization chosen by the Commission "to develop and oversee the delivery of the various training programs" was Charles C. Smith Consulting. Because of the Ministry's appeals, the consultant's first report to the Tribunal (the first semi-annual report required by Order No. 14) was not submitted until February, 2005. Taking the position that the outline of the Ministry-wide training proposed by the consultant in its report exceeded the consultant's mandate, the Ministry applied to the Tribunal for clarification of the Tribunal's orders. In this application, the Ministry sought leave to call an expert witness, arguing that the consultant's proposal with respect to certain matters was based on factual assertions that were not part of the evidence before the Tribunal, and that the Ministry was entitled to test those assertions through the presentation of expert evidence. Leave to call an expert witness was denied, so the hearing went on to consider the Ministry's objections to the consultant's interpretation of its mandate.

[94] ...I find that the contents of the consultants' proposals fall within the ambit of their mandate, and I so rule. For the sake of such additional clarity as I am able to provide at this time, but not so as to limit the scope of their proposals, by "contents" I mean the various programs outlined therein, including pilot projects, together with the measures necessary to evaluate their effectiveness and to carry out such document reviews and needs assessments as the consultants consider necessary for the preparation of those programs.

3. As to Monitoring and Reporting

[95] A proper interpretation of the orders read in light of the decisions of 1998 and 2002 reveals the intention that the third party appointed pursuant to Order 14 of the decision on implementation has the exclusive responsibility for the monitoring of the entire change process, and it is the ruling of this Tribunal that the Ministry has no monitoring function in respect of any aspect of that process.

[96] By reason of Order 14, the third party is to report to the Tribunal "at intervals no shorter than six months", copies of which reports are to be provided to the parties (and, now, to the intervener as well). However, in view of the difficulties already encountered, and because these reports serve as the best source of information to the parties (who are to be at arm's length from the third party), I am of the view that the reporting interval should be shorter for the foreseeable future. Thus, it is this Tribunal's ruling that the third party consultants report to the Tribunal on a quarterly basis. That ruling may be reviewed in one year's time at the request of the consultants or the parties. Since it is not appropriate for the third party to approach the Tribunal through any of the parties, the consultants may contact me at any time through the office of the Tribunal's Registrar, a copy of which communication will be provided to the parties.

...

Note: At the same hearing, the Tribunal also gave intervener status to O.P.S.E.U., the union representing most of the employees affected by the consultant's work, stipulating as follows:

> The Union, as it requested, was granted limited intervener standing "for the purpose of representing the interests of bargaining unit members as they are affected by and benefit from the systemic remedies" through making suggestions about the design and implementation thereof. However, such intervener status is not to be read as clothing the Union with any responsibility for, or authority over, the implementation process. In the course of representing the interests of its members, the intervener may make submissions to the Tribunal that do not unduly delay the proceedings or prejudice the parties, but it may not call evidence or participate in the examination or cross-examination of witnesses.

However, in a previous decision, the Tribunal rejected an application from Brian Scott, Senior Investigator with the Ministry's Independent Investigations Unit for intervenor status to address remedial questions. ((2001), 41 C.H.R.R. D/234) Mr. Scott requested that he be permitted to intervene on the grounds that evidence given by Dr. Agard could directly affect his employment, because Dr. Agard had recommended that the Independent Investigations Unit be abolished. The Tribunal held that Mr Scott's interests could be adequately defended by the Ministry. More recently, the Tribunal also rejected an application for standing by two employees of the Ministry. ((2005), CHRR Doc. 05-573) In the course of one of the hearings, these employees were alleged to have said derogatory things about Mr McKinnon. This evidence was offered in the context of dealing with the issue of the nature of the systemic remedies needed in the case. In rejecting the application, the Tribunal said,

> [22] It is inevitable in lengthy and prolonged proceedings such as this that negative and/or adverse findings be made against persons who are neither parties to nor witnesses therein. If such findings are dictated by the evidence and are essential to the resolution of an issue, if they are not simply gratuitous, then most certainly the Tribunal has jurisdiction to make those findings; indeed, "the duty of the tribunal is to reach that conclusion if those facts are relevant to the decision". Thus, in my view, it is not open to the Tribunal to declare that it lacks jurisdiction either to make negative or adverse findings of fact regarding non-parties or non-witnesses or to make orders that may have a negative impact on them in terms of employment or otherwise.
>
> ...
>
> [24] I have no doubt that acceding to Ms. Gupta's motion to grant standing to Mr. Duncan and Ms. Cybulski would result in undue delay in these proceedings. It has been alleged that they said certain things, evidence about which has been adduced by the Complainant, and it is Ms. Gupta's intention to recall those witnesses in order to cross-examine them—at least to the extent that an opportunity to review the transcripts suggests to her is required. She would participate in the examination of her clients as well. Not only would additional hearing dates be called for, but the need to accommodate the schedule of yet another legal representative would add to the logistical problems that have begun to overrun this hearing. While the evidence of Mr. Duncan and Ms. Cybulski regarding the incidents in question might assist the Tribunal in determining whether a systemic remedy of the kind the Complainant intends to seek is called for, it is entirely unnecessary for them to be granted standing as parties in order to obtain that assistance. Finally, neither of them has any overriding interest in the issues before the Tribunal.
>
> [25] In my opinion, to grant standing to anyone who asks for it on the basis that evidence has been given that might cast aspersions on them, or otherwise show them in an unflattering light, would be to invite chaos. It seems to me that the evidentiary issue that concerns Mr. Duncan and Ms. Cybulski is simply whether the allegations made in Exhibit 42 are substantially true. Whether they are called as witnesses is up to the parties; but, if they are called, each will have ample opportunity to testify fully regarding the issue of fact that concerns him or her.
>
> ...

The Tribunal also responded to a request to clarify the requirements of Order No. 8 of the 2002 decision: *Ontario (Ministry of Correctional Services) v. Ontario (HRC) No. 9* (2005), CHRR Doc. 05-368, 2005 HRTO 23.

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NOTE: The parties have been back before the Tribunal more recently in ***Ontario (Ministry of Correctional Services) v. Ontario (Human Rights Commission) (No. 14)*** (2007), 59 C.H.R.R. D/89, 2007 HRTO 4. The Tribunal again chastised the Ministry, *inter alia*, for

- delay in implementing the WDHP program and other Devlin recommendations as required by Order 12 of the 1998 decision and reiterated in Order 1 of the 2002 decision,
- mishandling WDHP complaints by failing to have them investigated by someone outside the Ministry as required by Order 8 of the 2002 decision,
- failing to act in good faith and with due diligence in taking steps to ensure that the view that Mr. McKinnon was 'the problem' was addressed and eradicated

Several orders were made to clarify previous orders, as follows:

NOTE: In a study for the Canadian Human Rights Act Review Panel (1999) entitled "The Human Rights Tribunal Order in *Action travail des femmes v. Canadian National*: A Path Littered with Obstacles". Rachel Cox traced events from when the order against CN took effect in 1988 until 1999. (The study is available only in French.) She reported systematic failures in compliance.

- The original order applied to the "St. Lawrence Region" of CN. In the years after the hearing, CN underwent a corporate reorganization in the course of which the "St. Lawrence Region" disappeared. CN tried to use this reorganization to limit the application of the order.
- CN has evaded the requirement to hire one woman for every four non-traditional positions filled by filling new positions with laid-off employees. CN claimed that it was not 'hiring', but merely recalling employees and that only new hiring was covered by the order.
- The order required that CN submit quarterly reports to the Commission. Cox reports that, in fact, data has been submitted only sporadically and is often incorrect and incomplete.

Cox also notes that the *Employment Equity Act*, S.C. 1995, c. 44, enacted since the *Action travail* case, would preclude bringing a similar complaint under the *Canadian Human Rights Act* today. The Canadian Human Rights Tribunal is now prevented, by s. 54.1, from imposing a

> special program, plan, or arrangement containing
>
> a) positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce; or
>
> b) goals and timetables for achieving that increased representation.

Parliament's intention seems to be that all such programs should be undertaken under the *Employment Equity Act*'s regime rather than through an ordinary human rights complaint. However, the employment equity regime is under the control of the Human Rights Commission rather than being capable of being activated by an individual or group complaint. Cox reports that the Human Rights Commission's preferred approach toward the *Action travail* complaint was far less ambitious than that of *Action travail des femmes*, the women's organization that brought the complaint. It was because of lobbying by the organization that the Commission ultimately agreed to send the case to a Tribunal, which ultimately ordered more far-reaching changes than those for which the Commission had been prepared to settle.

Chapter 12: The Competing Fora Issue

NOTE: *Human Rights Codes* were born in an atmosphere of distrust of courts and a complementary unwillingness of judges to get involved in human rights adjudication. Thus, in the early years, decision-making in this area was entirely the province of Human Rights Tribunals, and the Supreme Court decision in *Seneca College v. Bhadauria,* [1981] 2 S.C.R. 181 served to foster this aura of exclusivity. As Discrimination law has matured, however, it is only natural for those who think their rights have been violated to seek to vindicate those rights in any forum possible. The grievance procedure available to unionized workers and other statutory agencies and tribunals set up to oversee specific programs have been the two main contexts in which the issue has arisen.

Over time, anti-discrimination clauses have come to be standard features of collective agreements, giving labour arbitrators a foothold in human rights adjudication. The Ontario legislature reinforced this trend with the enactment of s. 48(12)(j) in 1993, the implications of which are taken up below in *Parry Sound (District) Social Services Administrative Board v. OPSEU.*

At the same time, most Codes have a primacy provision such at that in the Ontario *Code*:

> s. 47 (1) This Act binds the Crown and every agency of the Crown.
>
> (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

The primacy accorded the *Code* raises the question of whether statutory agencies dealing with disputes arising under other statutes should take on the task of applying the Code to those disputes.

An additional push has been given to the tendency to look beyond the Human Rights Tribunals by the backlogs that have plagued human rights adjudication since the late 1980s.

This trend gives rise to a number of issues about the penetration of human rights norms, the institutional suitability of various bodies to deal with these issues, and the traditional claims of human rights tribunals to superior expertise. The cases in this chapter introduce these debates.

Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324

[2003] 2 S.C.R. 157

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and Deschamps JJ. was delivered by

4. IACOBUCCI J. — This appeal raises questions about the application of human rights and other employment-related statutes in the context of a collective agreement. ... As I discuss in these reasons, I conclude that a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement. ...

I. Background

5. Joanne O'Brien was a probationary employee of the appellant District of Parry Sound Social Services Administration Board and a member of the respondent Ontario Public

the flexibility to hire probationary employees, allowing it to reserve the full panoply of employment benefits and guarantees for employees who have demonstrated their value.

99. Human rights abuses will not go unchecked. Aggrieved employees will have available the same mechanisms for enforcing their human rights as any other member of society: they may file a complaint before the Human Rights Commission, as the employer urged and as the legislature intended.

100. Collective agreements reflect the outcome of a sometimes difficult process of negotiation. The content of the agreement may reflect the acknowledgment of the union that it should not be called upon to deal with matters it is not equipped to deal with or that might cause conflicts within its membership. Where remedies are available elsewhere, the silence of the agreement may reflect the wishes of the union that those remedies be used in preference to the remedies available under the agreement. Silence in the agreement does not indicate a denial of a right or its remedies. On the other hand, overloading the grievance and arbitration procedure with issues the parties neither intended nor contemplated channelling there, may make labour arbitration anything but expeditious and cost-effective. ...

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NOTE: *Parry Sound* carried on a trend begun in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929. At issue in *Weber* was whether the courts had jurisdiction over a tort claim that arose out of a dispute under a collective agreement. The Supreme Court held that s. 45(1) of the *Labour Relations Act*, which requires collective agreements to provide for "Final and binding settlement by arbitration ... of all differences between the parties arising from the interpretation, application, administration, or alleged violation of the agreement", ousts the courts' jurisdiction not only over claims that could only arise under the collective agreement but even over claims that could be independently framed in tort. The Court relied not only on general policy reasons for confining industrial relations disputes to the industrial relations sphere, but also on the wording of s. 45. According to Iacobucci J., the section "makes arbitration the only available remedy" for differences arising from the collective agreement. This led the Court to adopt an "exclusive jurisdiction model" in preference to either concurrent or overlapping jurisdiction. The approach is described in *Weber* as follows:

> 52. In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd.* (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement: *Energy & Chemical Workers Union*, *supra*, *per* La Forest J.A. ... In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.
>
> 53 Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator. However, a review of decisions over the past few years reveals the following claims among those over which the courts have been found to lack jurisdiction: wrongful dismissal; bad faith on the part of the union; conspiracy and constructive dismissal; and damage to reputation ...